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ABSTRACT

This chapter examines court cases reported during 1986 that involved tort claims involving school officials, school employees, and students. A tort is a civil wrong, other than breach of contract, for which a court provides relief in the form of damages. Discussion focuses first on negligence, or conduct that falls below an acceptable standard of care and results in injury. Most negligence suits against schools result from student injuries during school hours, enroute to and from school, on school facilities, or during school activities. Negligence defenses derive from common law and statutory immunity, or from plaintiff's failure to file a claim within six months. Other topics discussed include cases arising from liability insurance claims and employee injuries or workers' compensation claims, as well as cases involving assault and battery, defamation, products liability, and intentional infliction of emotional distress. The final section focuses on constitutional torts, or cases alleging violation of litigants' constitutional rights. Included are discussions of cases brought by outside organizations, students, and employees. (TE)

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TORTS

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INTRODUCTION

The purpose of tort law is to offer remedies to individuals for harm which resulted from the unreasonable conduct of others. A tort is a civil wrong, other than breach of contract, for which a court provides relief in the form of damages. State laws provide the basis for most actions, which are predicated on the principal that individuals are responsible for the consequences of their conduct.[1]

1. *See generally*, W. Prosser, Law of Torts (4th ed. 1971).

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The major categories into which tort actions can be grouped are: negligence, which involves conduct that falls below an acceptable standard of care resulting in injury; intentional torts, where such actions as assault, battery, defamation, trespass, and false imprisonment are committed with the desire to do harm; and strict liability, where an injury results from the creation of an unusual hazard.[2]

This chapter will examine those cases reported during 1986 which involve tort claims within the school context. Included are cases involving school officials, school employees, and students.

NEGLIGENCE

Negligence is the most common tort alleged to have been committed by school personnel. Such a charge can result when an improper act, or a failure to act, causes injury to another person. For negligence to exist, the person causing the injury must fail to exercise a standard of care commensurate with the risks involved and the duty owed to the injured party.

There also must be a causal relationship between the alleged negligent conduct and the injury sustained. In negligence cases, questions of law are determined by judges, while questions of fact are decided by juries.

Student Injuries

Schools are responsible for maintaining a safe and healthy environment in which learning can take place. The following cases illustrate how injuries to students, while they were in the school setting, resulted in a variety of lawsuits with varying outcomes.

School Settings During School Hours. Two cases in Illinois involved students who were injured during physical education classes. A former student brought an action against the school district for spinal injuries suffered as a result of a trampoline accident.[3] The circuit court found for the school district and the plaintiff appealed. In affirming the lower court decision, the appellate court of Illinois examined three counts of the complaint: (1) that the school district was strictly liable for the consequences of exposing pupils to an "abnormally dangerous instrumentality," (2) that the school district was negligent in the selection and use of an "abnormally dangerous apparatus," and (3) that the school district was negligent in the hiring and supervision of teachers.

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2. *See* M. McCarthy & N.H. Cambron-McCabe, Public School Law (2nd ed. 1987).
3. Fallon v. Indian Trail School, 500 N.E.2d 101 (Ill. App. Ct. 1986).

In agreeing that the first two counts were properly dismissed, the court concluded that "although its negligent use can be the basis for liability, neither the trampoline itself nor its ordinary use is abnormally dangerous or ultrahazardous."[4] On the third count, the court found the questions of whether the school district failed to investigate, and whether the teachers were unqualified, were insufficient to state a cause for negligent hiring.

A student who was injured in a wiffleball game brought an action against the teacher, high school, and school district.[5] When the circuit court dismissed the charges of willful and wanton misconduct and negligence, the student appealed. The court explained the controlling standard:

> [A] willful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness, or carelessness when it could have been discovered by ordinary care.[6]

As the complaint did not allege the defendants intentionally caused the plaintiff's injury, the remaining issue was whether a reckless disregard for the plaintiff's safety was established. In affirming the lower court, the holding was that sufficient facts were not alleged upon which to base willful and wanton misconduct. The plaintiff did not show what specific circumstances made the activity more dangerous than other athletic activities normally conducted in the gymnasium, or why the teacher should have known of the impending danger.

In a third case involving a physical education class, a twelve year old Louisiana student was injured while engaged in a makeshift football game.[7] The teacher had left the class under the supervision of a teacher-aide while she attended a meeting with the principal. The injured student broke his leg resulting in its shortening. The trial court absolved the teacher and aide of responsibility, but in granting the student an award of $200,000, found the school district negligent for improper

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4. *Id.* at 481.
5. Tijerina v. Evans, 501 N.E.2d 995 (Ill. App. Ct. 1986).
6. *Id.* at 680.
7. Marcantel v. Allen Parish School Bd., 490 So. 2d 1162 (La. Ct. App. 1986). *See also* Aleroff v. Casagrande, 504 N.Y.S.2d 719 (App. Div. 1986) (jury verdict of negligence was upheld where a student was injured by an eraser thrown while the teacher was out of the room and the teacher was aware of rowdy behavior of students in his absence); Emery v. Chapman, 495 So. 2d 371 (La. Ct. App. 1986) (case where a girl was injured by a student with a propensity toward violence of which the school principal and school board were aware was remanded for trial).

supervision.

The Court of Appeals of Louisiana affirmed the decision with the modification that the teacher was 5% at fault. Testimony showed she had returned before the accident took place. The award was allowed to stand, as the court found a causal relationship between the injury and the shortening of the student's leg.

A sixth grade Illinois student sustained a head injury while playing kickball during a supervised recess period.[8] For approximately an hour and a half, the student was seated on a bench near the principal's office. During that time, the child's mother was contacted and she instructed that her child be taken to the hospital. After several calls to a police emergency number failed to bring an ambulance, a call was made to a hospital located directly across the street from the school and an ambulance was sent immediately. In the intervening ninety minutes, the child's condition had deteriorated markedly. Following an operation, the student required a cane to walk, had weakness on his left side, and experienced headaches. The doctor who performed the operation testified that had the child been brought in an hour earlier, he would merely have had a seven to ten day hospital stay. The appellate court affirmed the decision that the school staff had acted willfully and wantonly in failing to obtain prompt medical attention for the injured student. In particular, the court cited that the hospital was located directly across the street, and the mother had given specific orders to take her child there.

A student in a Kansas high school, who was injured during a woodworking class, brought an action against the teacher and the school board.[9] The student cut his fingers while working with a table saw from which the teacher had removed a safety guard while changing the blade. In affirming the district court decision, the Supreme Court of Kansas noted that the student had previously taken a beginning woodworking class, reviewed instructions on safe use of the saw, and twice passed a test on its use. While there was some evidence that the instruction and supervision were not totally adequate, a divided court let stand the trial court's decision against the student.

There were two cases which involved students with specific physical disabilities. In Nebraska, an eleven year old student who suffered from a congenital deformity of the spinal column, fractured his leg while participating in a physical therapy program administered at his elementary school.[10] An action which was brought against the school district

8. Barth v. Board of Educ., 490 N.E.2d 77 (Ill. App. Ct. 1986).
9. Paulson v. Unified School Dist. No. 368, 717 P.2d 1051 (Kan. 1986).
10. Greening v. School Dist., 393 N.W.2d 51 (Neb. 1986).

was dismissed by the district court with a directed verdict. On appeal, the Supreme Court of Nebraska explained that "only where reasonable minds can draw but one conclusion from the evidence presented is a directed verdict an appropriate method of terminating litigation."[11] Applying that principle, the court affirmed the decision holding the school district could not be held liable for the negligence of a state-employed therapist. That therapist had directed a school district employee to assist in the student's therapy, but since the employee's actions were not found to have been the proximate cause of the injury, the school district could not be held liable for his actions. Finally, the orders given by the therapist to the school employee were not found to be so obviously improper that the employee should have refused to carry them out, or even to make further inquiry.

In New York, parents of a young child alleged that she was injured as a result of the school district's failure to examine her for scoliosis.[12] The supreme court, appellate division affirmed the local court decision in favor of the district, finding that the state legislature "did not intend to create a private cause of action based upon a school district's failure to examine students for scoliosis."[13]

In a case involving the administration of corporal punishment, a Louisiana father sued a teacher and the school's liability insurer for damages resulting from injury to his son.[14] The district court rejected the claim, and the decision was upheld by the court of appeals. The paddling was found to be reasonable in degree, rendered for disciplinary reasons, and imposed in accordance with school rules.

En route to and from School. There were two cases in which actions for the injury of students being transported to or from school were successful. The Supreme Court of Kentucky affirmed a court of appeals decision involving a wrongful death action for a student who was killed in a school bus accident.[15] The court recognized that a statute creating a right of recovery for surviving parents for the loss of a child's affection was a new and separate remedy, rather than a method of enhancing damages in a wrongful death suit.

In Pennsylvania, a six year old was injured when the van in which she was riding stopped suddenly, throwing her forward. Her parents brought an action against the school district and the owner of the van.

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11. *Id.* at 54.
12. Grindle v. Port Jervis Cent. School Dist., 500 N.Y.S.2d 314 (App. Div. 1986).
13. *Id.* at 315. *See also* Henry v. State Dep't of Health and Human Resources, 482 So. 2d 962 (La. Ct. App. 1986) (child's father failed to show that negligence by a state school caused a quadriplegic and spastic cerebral palsy patient to break his leg).
14. Harrell v. Daniels, 499 So. 2d 482 (La. Ct. App. 1986).
15. Department of Educ. v. Blevins, Ky., 707 S.W.2d 782 (Ky. 1986).

After the claim against the district was dismissed, a jury trial resulted in a verdict for the defendants. That decision was set aside by the court of common pleas. On appeal, the Supreme Court of Pennsylvania affirmed the decision holding that the jury should have been allowed to consider evidence that the operator of the van had failed to use available seatbelts to restrain the child.[16]

In New York, there was a transportation action where a student was not successful. Suit was brought after the student was hurt when the bus in which he was riding was involved in an accident with a sanitation truck.[17] A state supreme court (trial court) recognized that the bus was being operated in a normal manner, and held that such operation is not inherently dangerous work. Therefore, in finding for the school district, the rule that liability cannot be avoided by employing an independent contractor to perform such work, was not applicable to the school board.

The death of a twelve year old student, struck and killed by an automobile at a school bus stop, was the subject of an action against a school district.[18] The District Court of Appeal of Florida found that the district was liable by locating the bus stop and not sufficiently monitoring the incidents of near misses when vehicles left the roadway nearly hitting waiting children. The mere absence of prior accidents or death were seen as fortuitous circumstances for which the board could claim no credit.

The parents of a five year old kindergarten student who was hit by an automobile while walking home, brought an action contending that by placing a crossing guard at an intersection during the afternoon, the school district assumed a duty to do so in the morning when kindergarten students were walking home.[19] The Superior Court of Colorado, in finding for the school district, explained that in order to recover under an assumed duty theory,

> [a] plaintiff must first show that the defendant, either through its affirmative acts or through a promise to act, undertook a service that was reasonably calculated to prevent the type of harm that befell the plaintiff. Second, a plaintiff must also show either that he relied on the defendant to perform the service or that defendants' undertaking increased plaintiff's risk.[20]

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16. McKee v. Southeast Delco School Dist., 512 A.2d 28 (Pa. Super. Ct. 1986). *See also* Throop v. Johnson, 720 S.W.2d 30 (Mo. Ct. App. 1986) (an injured motorist was granted a new trial in an action against a school bus driver).
17. Settles v. Incorporated Village of Freeport, 503 N.Y.S.2d 945 (Sup. Ct. 1986).
18. Duval County School Bd. v. Dutko, 483 So. 2d 492 (Fla. Dist. Ct. App. 1986).
19. Jefferson County School Dist. R-1 v. Gilbert, 725 P.2d 774 (Colo. 1986).
20. *Id.* at 776.

Having the guards present when several times as many children were released in the afternoon was not found to make it negligent when guards were not provided when a single grade was dismissed in the morning.

In Washington, a seven year old student was fatally injured when he was struck by an automobile while crossing a street on his way home from school. Wrongful death actions were brought against the school district and the driver of the vehicle. The district and the driver cross-claimed against each other and later counter-claimed against the parents for contribution. The court of appeals upheld the part of the trial court's decision that the parental-immunity doctrine was not abrogated on the basis that the cause of action was for wrongful death. However, it also reversed the trial court by finding the school's negligence, in failing to implement and supervise students in the use of school buses, not to have been a proximate cause of the child's death.[21]

A six year old California first grade student was struck and injured by an automobile as she walked home. The accident occurred near the school at a site frequently used by school children as a "short cut." In the suit brought on behalf of the child, the state court of appeal examined two questions. First, did the school district have potential tort liability for failure to remedy a potential dangerous condition? Second, did the district have potential liability for failure to provide an adequate course of safety education, or to cause a crossing guard to be employed at the site of the accident? In denying the first claim, the court stressed that the school district neither owned nor controlled the property alleged to be in a dangerous condition. Similarly, on the second claim, the court found that the defendant's liability could only have been based on an alleged failure to exercise due care in supervision on school premises.[22]

Also in California, a student brought an action against her school for injuries she sustained in an automobile accident.[23] Her high school had let out early, urging students to attend a school-sponsored parade scheduled to take place approximately one and a half miles away. No transportation was provided to the parade location, and there was no supervision of students walking to the site. In addition, buses were not scheduled to be available to take students home until their usual time. The plaintiff accepted a ride to the parade site from another student, and was seriously injured when the vehicle was involved in an accident. Although the

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21. Chhuth v. George, 719 P.2d 562 (Wash. Ct. App. 1986).

22. Marcia S. v. Gibbel, 223 Cal. Rptr. 206 (Dist. Ct. App. 1986).

23. White v. Moreno Valley Unified School Dist., 226 Cal. Rptr. 742 (Dist. Ct. App. 1986). *See also* Cloman v. Monroe City School Bd., 490 So. 2d 691 (La. Ct. App. 1986) (motorist was successful in an action for damages from emotional trauma caused when she struck and killed a handicapped student).

trial court entered a judgment for the student, she appealed claiming that evidence of medical expenses incurred on her behalf were excluded. The court of appeal held that the cause of action to recover medical expenses does not belong exclusively to the student's parents, but to both the parents and the minor. Therefore, the tort claim was not deficient.

School Buildings and Grounds. In a case emanating from Oregon, a student brought an action to recover for physical and emotional injuries after being assaulted and raped on school grounds before school began.[24] She claimed the school district was negligent in failing to provide adequate security, and in failing to warn students of a prior similar incident. After the circuit court gave a directed verdict for the district, the student appealed. In reversing the lower court opinion, the Court of Appeals of Oregon concluded that the similarity of the incident to the earlier one made the attack on the student reasonably foreseeable.

A California student who was stabbed by a nonstudent while on school grounds, brought an action against the school board.[25] The state court of appeal found that the special relationship which exists between student and school district imposes a duty on the district to protect the student. However, in finding for the school board, the court explained that no physical defects or conditions of the campus which would increase the risk of crime were alleged. In addition, the allegation that other such acts occurred on the campus gave notice, but did not place the situation within the legal parameters of a dangerous condition which would state a cause of action.

When a Massachusetts student pushed at a swinging entrance door to his school's auditorium, he put his hand through a glass panel. The action caused permanent injury to the hand. The student brought suit against the city of Boston for failing to glaze an interior door with reinforced glass.[26] The superior court rejected the position that the city had no duty to install safety glass on the door and ruled for the plaintiff. That decision was affirmed by the Appeals Court of Massachusetts which explained that the plaintiff had presented evidence,

> that there existed a recognizable hazard; a hazard that existed in a setting where the hazard was likely to have consequences (a swinging door to a place of assembly used by teenagers

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24. Fazzolari v. Portland School Dist. No. 1J, 717 P.2d 1210 (Or. Ct. App. 1986). *See also* Alvarez v. Dade County School Bd., 482 So. 2d 542 (Fla. Dist. Ct. App. 1986) (a directed verdict was deemed inappropriate where there was conflicting testimony as to what time school authorities provided adult supervision on school premises and as to what time an accident occurred).

25. Rodriguez v. Inglewood Unified School Dist., 230 Cal. Rptr. 823 (Dist. Ct. App. 1986).

26. Johnson v. City of Boston, 490 N.E.2d 1204 (Mass. App. Ct. 1986).

who were likely to be high spirited, distracted, or both); and that relatively simple and inexpensive means existed to reduce the hazard.[27]

School-related Activities. While participating in an interscholastic football game, a black Massachusetts student was shot and paralyzed for life. The shooting was allegedly perpetrated by "unknown white persons." The student and his family filed suit alleging that the city of Boston negligently failed to protect the student from racial violence which they knew or should have known was likely at such an interracial event. It also was charged that the city's negligence amounted to deprivation of liberty without due process, a violation of the fourteenth amendment. The district court dismissed the complaint for failure to state a claim. While expressing sympathy for the student and his family, the court of appeals affirmed that decision.

It had not been alleged that the city had knowledge of the impending attack, nor that there had been racial violence at previous school athletic events. Moreover, it was not asserted that the city provided no security at the game. Therefore, the allegations involved common law negligence, which by itself does not state a claim for deprivation of liberty without due process of law.[28]

A Florida high school student, who had stayed after school to have his picture taken with the junior varsity football team, was beaten by three students while waiting in a cafeteria area. In an action against the school, he contended that by failing to supervise the cafeteria area the school had breached its duty to provide adequate security for its students. The circuit court entered judgment upon a jury verdict holding the school officials responsible for the student's injuries. The District Court of Appeal of Florida upheld the verdict awarding $30,000 for the student.[29] The court found a duty for the school to provide supervision and protection "in a centrally located part of the school building which students regularly occupy with the school's consent and knowledge during the hours immediately after the end of classes."[30] In addition, the court rejected the contention that fighting was not foreseeable when a small number of students are waiting in an area to be picked up from school.

The parents of a thirteen year old student who was struck by an automobile while attempting to cross the street brought suit against two teachers.[31] At the time of the injury, the student was on a field trip and

27. *Id.* at 1206.
28. Williams v. City of Boston, 784 F.2d 430 (1st Cir. 1986).
29. Broward County School Bd. v. Ruiz, 493 So. 2d 474 (Fla. Dist. Ct. App. 1986).
30. *Id.* at 477.
31. King v. Kartanson, 720 S.W.2d 65 (Tenn. Ct. App. 1986).

was crossing the street to play in a park with other students. The circuit court found the teachers negligent for allowing the student to cross the street unsupervised. The Court of Appeals of Tennessee reversed the decision on the basis that the standard of care is that which is reasonable and ordinary under the circumstances. There was nothing in the record to suggest that the student would not use ordinary care for his safety, or that the street was unreasonably dangerous to cross. Therefore, the teachers did not have a duty to personally escort the student.

A Louisiana high school student, who was attending a school-sponsored dance, became intoxicated despite rules forbidding such behavior. Toward the end of the evening, in the school's parking lot, the student became sick and was told by two other students to refrain from sitting on their cars. When one of the cars was moved a short while later, the plaintiff, who was lying under the right side of the car, was run over and severely injured. Actions were brought against the two students in the parking lot, their parents and automobile insurers, the school board, its insurer, and the insurer of the sheriff. A jury trial was conducted for all parties except the school board, which was decided by the trial judge. The jury found no liability on the part of the students, parents, or their insurers, but did find the plaintiff guilty of contributory negligence. The jury also found the insurer for the school board and the sheriff liable, as their insureds had the last clear chance to avoid the accident. The trial judge found no liability on the part of the school board despite the fact that its insurer was held liable by the jury.

The Court of Appeal of Louisiana reversed that part of the decision holding the sheriff liable. Although two deputies from the sheriff's office were assigned to the dance the night of the accident, the court explained that the duty of the police is to the general public and not to the individual. The officers had earlier patrolled the lot, and there was no evidence that they had seen the plaintiff in an intoxicated state. The plaintiff, therefore, was unable to prove that the defendant owed him a special duty outside that owed to the general public.[32]

In New York, a fourteen year old asthmatic student complained to the school nurse that she was feeling ill, but was denied treatment and directed back to class. Instead, the girl chose to leave the school, apparently without permission. After arriving home, and while her mother was telephoning an ambulance, the girl fell from an apartment window. In court, it was asserted that the school negligently failed to supervise and care for the student. That claim was denied with the holding that the child had passed out of the authority of the school. And, while the school bore no further duty to protect her, even if a duty was owed the school's

32. Lowe v. Patterson, 492 So. 2d 110 (La. Ct. App. 1986).

conduct was not seen as the proximate cause of the student's injuries.[33]

NEGLIGENCE DEFENSES

Immunity

Traditionally, the most commonly used defense has been governmental immunity. One premise is that school districts lack the legal ability to pay tort claims since public funds can only be used for statutorily prescribed purposes.[34] Increasingly, legislative and judicial inroads have restricted the use of this defense. Still, in the thirteen cases involving an immunity defense, school districts were found liable in only three.

Common Law (Governmental Immunity). Four cases involving governmental immunity emanated from Pennsylvania. In one, a member of a cheerleading squad was injured during an after school practice session held on school grounds. The incident occurred during an unsupervised practice which had been scheduled by a faculty advisor. The student's action against the school district alleged negligent supervision, a claim denied by the court of common pleas. The appellant sought exception to the Tort Claim Act as it relates to the care, custody, and control of real property. In affirming the lower court decision, the commonwealth court explained that immunity is not waived just because the incident occurred on government owned property. Furthermore, "it would be a total distortion to allow the supervision to fall within the care, custody, and control of real property."[35]

A mother filed a wrongful death complaint after her son had sustained a fatal knife wound in a high school hallway.[36] The common pleas court granted a motion for judgment in favor of the school district. On appeal, the mother reasoned that the school district was liable for failing to provide police and security protection, negligent medical care, and ignoring warnings that her son's life was in danger. The commonwealth

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33. Griffith v. City of New York, 507 N.Y.S.2d 445 (App. Div. 1986).

34. *See* K. Alexander, R. Corns, & W. McCann, Public School Law: Cases and Materials (1969), at 336.

35. Messina v. Blairsville-Saltsburg School Dist., 503 A.2d 89 (Pa. Commw. Ct. 1986). *See also* Yount v. Board of Educ., 712 S.W.2d 455 (Mo. Ct. App. 1986) (court declined to give retrospective effect to a statutory waiver of sovereign immunity).

36. Gilbert v. School Dist. of Philadelphia, 511 A.2d 258 (Pa. Commw. Ct. 1986). *See also* Merritt v. Board of Educ., 513 A.2d 504 (Pa. Commw. Ct. 1986) (doctrine of sovereign immunity applied in action against school principal and board of education for rape of mentally retarded minor in a school ladies room—lack of proper supervision had been alleged).

court, in rejecting these arguments and affirming the lower court decision, held that the plaintiff failed to produce any facts which would deprive the school district of immunity. In response to the plaintiff's attempt to amend her complaint to name specific individuals, the court found that the statute of limitations had run out in regard to bringing a new and distinct party to the action.[37]

After a Pennsylvania student was killed by an automobile as he attempted to cross an intersection in order to board a school bus, his parents brought a negligence action against the city and board of education.[38] The sole issue was the possible governmental immunity of the defendants. In affirming the lower court's decision, the commonwealth court found both the city and the school board of education immune from liability. Although the legislative intent of a specific section of the Pennsylvania Vehicle Code was to protect students, the clear language of the statute which protected the defendants "could not be disregarded under the pretext of pursuing its spirit."[39]

The plaintiff parents of a high school student, who was killed while joy riding in a car set to be worked on by the school's auto shop class, sought exception to the district's governmental immunity. In affirming the lower court decision, the Commonwealth Court of Pennsylvania determined that the alleged negligent conduct did not fall under the vehicle, real property, or proprietary exceptions to governmental immunity.[40] The vehicle exception did not apply since it was undisputed that, at the time of the accident, the car in question was driven by a student and not a government employee or agent. The real property exception did not apply, the court explained, because the alleged negligence consisted of a failure to adequately supervise students. Finally, the appellants argued that because the school charged money for the services provided in the auto shop, it was not immune from actions arising directly from that activity. The court also rejected this argument citing statutory provisions controlling the situation at hand.

In Texas, a woman was injured when the bleachers at a middle school basketball game collapsed. She contended that the basketball game was proprietary in nature, and therefore her suit for damages fell outside the district's governmental immunity. The trial court found for the school district, and was affirmed by the court of appeals. The appellate court explained that "scholastic athletic programs, even though performed within the territorial limits of the district, are governmental

37. *Id.* at 280. *See also* Mapp v. Drake, 344 S.E.2d 682 (Ga. Ct. App. 1986).
38. Bryson v. Solomon, 510 A.2d 377 (Pa. Commw. Ct. 1986).
39. *Id.* at 381.
40. Davies v. Barnes, 503 A.2d 93 (Pa. Commw. Ct. 1986).

in nature."[41] The court saw the purpose for creating a school district as purely governmental, and therefore its actions to be those of an agent of the state. In answering the appellate's claim that she was not a student or employee of the school district but instead an admission paying spectator at the school sponsored game, the court said:

> Whether a particular school sponsored activity is governmental in nature is not determined by the person involved or injured as a result of such activity, but by the function itself. The rule of governmental immunity for a school or school district exists for the benefit of the whole and its school system, and the purpose of the rule would be defeated if its application was made dependent on the status of the injured plaintiff.[42]

A personal injury action was brought on behalf of a Michigan junior high school student who allegedly had been assaulted by his teacher while on off-school premises.[43] The plaintiff appealed a circuit court summary decision dismissing charges against the teacher's principal and superintendent. The Court of Appeals of Michigan upheld the lower court decision explaining that the plaintiff was unable to establish malicious or intentional unlawful behavior on the part of the defendants. Therefore, the doctrine of governmental immunity had been appropriately applied. In addition, the court found there was no reasonable cause to believe that the defendants were aware of the teacher's actions.

In the following three cases the governmental immunity defense was specifically denied. In a case from Michigan, a middle school student drowned when he failed to resurface after diving into a pool during swimming class.[44] The boy's father filed a wrongful death action against the swimming class instructors and the school's administrators. The circuit court found the acts of the defendants discretionary and therefore immune from tort liability. The court of appeals affirmed that portion of the decision which recognized that the methods of rescue and attempted resuscitation employed by the instructors were discretionary and cloaked with immunity. However, with respect to the administrator's alleged failure to properly supervise both the children and the instructors' decision-making as it relates to instruction, the court reversed the holding of immunity from tort liability.

A Pennsylvania student, who had been injured going over a vaulting horse in a district gymnasium, brought suit against the school district.[45]

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41. Gravely v. Lewisville Indep. School Dist., 701 S.W.2d 956, 957 (Tex. Civ. App. 1986).
42. *Id.* at 958.
43. Rosencrans v. Kingon, 397 N.W.2d 317 (Mich. Ct. App. 1986).
44. Webber v. Yeo, 383 N.W.2d 230 (Mich. Ct. App. 1986).
45. Singer v. School Dist. of Philadelphia, 513 A.2d 1108 (Pa. Commw. Ct. 1986).

The student broke his elbow when he fell and missed a mat and landed on a hardwood floor. The trial court found for the district citing the doctrine of governmental immunity. A commonwealth court of Pennsylvania reversed the decision and remanded the case for retrial. Since proper gym floor matting is an essential safety element of a gymnasium floor utilized for a vaulting stunt, the court found it within the district's care, custody, and control of its real property, and therefore subject to the real property exception to governmental immunity.

In another Pennsylvania case involving a gymnasium accident, parents of a sixteen year old student brought an action against the school district.[46] While using a set of collegiate gymnastic rings during gym class, the student fell rendering himself a quadriplegic. The trial court entered a summary judgment in favor of the school district. A commonwealth court of Pennsylvania again reversed the decision and remanded the case. The court upheld the parent's contention that the facts in their complaint place it within the real property exception. Such immunity can be denied, the court explained, "only when there is negligence which makes government-owned property unsafe for the activities for which it is regularly used."[47]

Statutory Immunity. A student was sexually assaulted by another student at a South Carolina school which serviced mentally retarded children. The action brought against the school board on behalf of the injured student was dismissed by the trial court citing the immunity of the school. On appeal, it was contended that the school was in actuality a hospital or other medical facility and therefore sovereign immunity was statutorily waived. In affirming the lower court decision, the Supreme Court of South Carolina recognized that the physical services given to the students were more extensive than those given to the rest of the student population. However, these were seen as secondary to the school's mission to educate children.[48]

In Georgia, a school district and principal were judged statutorily immune from a suit brought for injuries sustained when a student slipped on a wet floor and fell down stairs. The immunity provided was not found to have deprived the student of property without due process of law.[49]

Other Defenses/Notice of Claim

In addition to claims of immunity, other defenses can apply to

46. McCloskey, v. Abington School Dist., 515 A.2d 642 (Pa. Commw. Ct. 1986).
47. *Id.* at 644.
48. Miller v. Gertz, 341 S.E.2d 620 (S.C. 1986).
49. Sisson v. Douglas County School Dist., 351 S.E.2d 272 (Ga. Ct. App. 1986).

negligent tort actions. The timely notice of claim requirement is designed to allow defendants an opportunity to investigate a claim while the facts surrounding it are still recent. Failure to make timely notice can be grounds for the dismissal of a complaint.

A Florida mother brought suit against the school board for injuries allegedly suffered by her daughter in physical education class.[50] A week after the injury the plaintiff's attorney sent written notice of the accident to the superintendent of schools, the county manager, and the board's insurer. Nearly eleven months later a claims representative for the board's insurer sent a letter indicating the claim was being investigated. Following that, contact between the attorneys for the two sides indicated that the insurer was interested in settling the case. By the time a settlement was reached, and medical documentation assembled and sent to the insurer, the three year notice period had run out. Based on this the insurer backed out of the settlement. The plaintiff said that she did not give timely notice to the Department of Insurance because the action of the claims representative caused her to believe that the case would be settled. Rejecting this argument, the district court dismissed the case for lack of statutory notice. The court of appeals reversed that decision recognizing that notice may be waived.

> [W]hen responsible agents or officials of a city have actual knowledge of the occurrence which causes injury and they pursue an investigation which reveals substantially the same information that the required notice would provide, and they thereafter follow a course of action which would reasonably lead a claimant to conclude that a formal notice would be unnecessary, then the filing of such a notice may be said to be waived. If the claimant, as a result of such municipal conduct, in good faith fails to act, or acts thereon to his disadvantage, then the estoppel against the requirement of the notice may be said to arise.[51]

In New York, the parents of a student who allegedly was injured when he was pushed and his head hit a chair, brought suit against the school district.[52] General municipal law stated that the defendant school district was entitled to hold a hearing, which could include a physical examination of the injured party, as a condition to the plaintiff instituting an action. The law required the demand be served within ninety days from the filing of the notice of claim. The plaintiffs moved for an order

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50. Meli v. Dade County School Bd., 490 So. 2d 120 (Fla. Dist. Ct. App. 1986).

51. *Id.* at 121. *See also* Dallas Indep. School Dist. v. Porter, 709 S.W. 2d 642 (Tex. 1986) (decision on a notice of claim in a worker's compensation case filed by the widow of the employee was reversed, but on the issue of jurisdiction).

52. Rizzi v. Patchogue-Medford UFSD No. 24, 503 N.Y.S.2d 967 (Sup. Ct. 1986).

striking the school district's affirmative defense which alleged violation of the general municipal law.

In granting the order, the court explained that although the school district did not meet the time requirement, the time period was not to be construed as a statute of limitation. At the same time, there was no general requirement that an injured plaintiff must wait until a hearing is held to commence his action.

Whether a notice of claim requirement applied to a handicapped student was at issue in another New York case.[53] In an action brought by a student to recover for personal injuries, the defendant school district sought to have the complaint dismissed citing an expired statute of limitations. The motion was denied and the school district appealed. The supreme court, appellate division reversed the decision finding that the lower court should have conducted a hearing before finding the student, who was mentally handicapped, to be insane as defined by statute. The court, however, found an issue of fact as to the extent of the student's ability to handle her own affairs and remitted the case for a proper hearing. It was seen as obvious that a mentally handicapped individual, unable to function in society, could qualify as insane and be entitled to a waiver of notice requirements.

In California, a claim was made that a student's injury was a result of the school district's failure to property maintain its premises. Seven months after the school district claimed to have mailed a rejection of the claim, the guardian of the student filed the complaint. A superior court granted the district a summary judgment based on the fact that the plaintiff had not filed the complaint within the sixth month period provided by law. The court of appeals reversed the decision pointing out that the district's declaration did not sufficiently establish that the rejection had been mailed at the time claimed.[54]

LIABILITY INSURANCE

The extent to which an insurer must defend school board members was the issue in an Illinois case.[55] A former school director brought an action against the members of the school board holding them liable for injuries suffered as a result of his allegedly wrongful termination. The motion considered by the district court was the determination of wheth-

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53. Kelly v. Solvay Union Free School Dist., 498 N.Y.S.2d 935 (App. Div. 1986).

54. Rincon v. Burbank Unified School Dist., 224 Cal. Rptr. 88 (Cal. Ct. App. 1986). *But see* Salo v. Board of Educ., 498 N.Y.S.2d 925 (App. Div. 1986) (notice of claim requirement was upheld where no adequate excuse for dely was provided).

55. Kufalk v. Hart, 636 F. Supp. 309 (N.D. Ill. 1986). *See also* Government Employees Ins. Co. v. Gibraltor Casualty Co., 229 Cal. Rptr. 57 (Ct. App. 1986).

er the school district's insurer owed the school board members a defense of the action under a general liability insurance policy. While the court recognized that it was highly questionable whether many of the injuries would ultimately provide a basis for recovery, Illinois law provides that even groundless, false, or fraudulent allegations support an insurer's duty to defend. In so ordering, the court reminded that the liability of the insurer would ultimately be determined by the facts as they come out at trial.

A Philadelphia school district's liability insurer brought an action seeking reimbursement for costs incurred defending two teachers in a wrongful death action. A student had drowned on a weekend trip organized by the teachers. The court of appeals reversed the district court judgment for the school district. The holding was that by joining the teachers as third-party defendants, the district acquired the same status it would have had if it had been named a party in the original complaint. This was seen as true, even though the complaint contended that the teachers were not acting within the scope of their employment. Pennsylvania law requires political subdivisions to defend personal injury actions against their employees unless there has been a judicial determination that the act or omission was not within the scope, office, or duties of the employee.[56]

There were three other instances where liability insurers were found responsible for legal expenses incurred by school districts. Criminal charges against a New Jersey school employee were dismissed, and the school board had become liable for court costs. The appeals court found the insurer liable for the costs, as a compensable accident had occurred within the meaning of the indemnity policy issued to the school board.[57]

A school board in New York brought a successful action against its liability insurer for an alleged breach of contract to pay the board's expenses for defending against a segregation suit.[58] And, in Mississippi, when a school district sued its insurer for an alleged bad-faith refusal to pay benefits, the district court required that dispensation be made by the insurance company at each stage of the proceeding, rather than after all appeals.[59]

In two cases, liability insurers were successful in their actions to remove all or part of their responsibility. A Nebraska school district sought reversal of a decision in which its insurer was not required to pay

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56. Atlanta Int'l Ins. v. School Dist. of Philadelphia, 786 F.2d 136 (3d Cir. 1986).

57. Meeker Sharkey v. National Union Fire Ins., 506 A.2d 19 (N.J. Super. Ct. App. Div. 1986).

58. Board of Educ. v. CNA Ins. Co., 647 F. Supp. 1495 (S.D.N.Y. 1986).

59. Western Line Consol. School Dist. v. Continental Casualty Co., 506 A.2d 19 (N.J. Super. Ct. App. Div. 1986).

for losses incurred in a suit by a student's parents.[60] The parents had initiated the action to stop the consolidation of certain schools in the district. In affirming the lower court's decision, the Supreme Court of Nebraska held that the causes for action in the suit sought relief for other than monetary damages and therefore, under the terms of the policy, the insurer was not responsible for the district's legal costs.

A Michigan music teacher, who was injured in an automobile accident, was disabled as defined by both her automobile insurance company and the insurer of the school board. The board's insurance company paid no-fault wage benefits, but deducted a portion as a result of a social security award, The court of appeals agreed that the teacher was not required to exhaust the internal grievance procedures under the terms of her collective bargaining agreement prior to bringing her action for the deducted amount. However, the court held that the insurer and the board of education were entitled to off set the social security disability benefits received by the teacher. The intent of the state's legislation in this area was, the court explained, "to prevent the payment of no-fault benefits duplicating governmental benefits."[61]

EMPLOYEE INJURIES / WORKER'S COMPENSATION

A New York teacher, who was injured when a metal object was hurled into a school yard from an adjoining property, brought an action against the school board.[62] The Bronx County Supreme Court dismissed the complaint and the teacher appealed. The appellate court found that by not taking any steps to prevent injuries to teachers and students, or providing even minimal information of the periodic occurrence of similar incidents, the complaint against the school board had to be reinstated.

A Louisiana teacher, who was a victim of an armed robbery on school premises, brought an action against the school board to recover the value of property taken from her.[63] In affirming the district court decision, the court of appeals held that the board could not reasonably have been expected to forsee that an unrepaired hole in the school's fence would create a dangerous place for the teacher to work.

Two cases from New York provide examples of unsuccessful at-

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60. Sandy Creek Pub. Schools v. St. Paul Surplus, 384 N.W.2d 279 (Neb. 1986).

61. Grau v. Detroit Auto. Inter-Ins. Exchange, 383 N.W.2d 616, 619 (Mich. Ct. App. 1986).

62. Rubino v. City of New York, 498 N.Y.S.2d 831 (App. Div. 1986). *See also* Blood v. Board of Educ., 509 N.Y.S.2d 530 (App. Div. 1986) (school teacher's negligence did not relieve corporation counsel of a statutory duty to defend her).

63. Kavanaugh v. Orleans Parish School Bd., 487 So. 2d 533 (La. Ct. App. 1986). *See also* Litomisky v. St. Charles High School, 482 So. 2d 30 (La. Ct. App. 1986) (injured football referee failed to state a cause of action in his negligence suit against the school district).

tempts to recover for injuries allegedly caused by negligence. A teacher who was carrying a carton through the aisle of the supply room in her school, fell over a small box on the floor resulting in injury. The appellate court upheld the dismissal of her suit against the school board explaining that she had not shown the board created the condition that caused the accident, or had active or constructive notice of the allegedly dangerous condition.[64]

A volunteer worker for a teacher's organization was injured when she fell in a middle school cafeteria. Her negligence action was against the teacher's organization and the school district.[65] The court of appeals upheld the earlier jury verdict finding the accident not to be attributed to negligence. Although there was conflicting testimony as to the condition of the floor at the time of the accident, the court explained that:

> When a plaintiff challenges an unfavorable verdict on the grounds that it is against the weight of evidence, the motion should not be granted unless a preponderance of the evidence is so greatly in the plaintiff's favor that the jury could not have reached its conclusion on any fair interpretation of the evidence.[66]

The duty risk analysis used to determine legal responsibility in tort claims was outlined in a decision involving an injury in a physical education class.[67] A teacher's aide in a Louisiana high school was injured when she was struck by a ball thrown by a student. The aide brought an action against the parents of the student. The district court denied the claim and the aide appealed. The appellate court explained that the pertinent inquiries are: (1) whether the conduct of which plaintiff complains was a cause-in-fact of the harm; (2) whether there was a duty owed on the part of the defendant which was imposed to protect against the risk involved; (3) whether there was a breach of that duty; and (4) damages.

On the first inquiry, the defendants admitted that the student's action was the cause-in-fact of the harm. On the second, the court expressed no knowledge of any duty "placed upon a participant in a sports activity abiding by the rules of the game to refrain from accidentally injuring a spectator who is fully aware of the risks involved."[68] Having thus ruled, the third and fourth inquiries were not addressed. The aide also contended that the trial court failed to properly apply strict liability to the facts of the case. Under such a condition, parents can be held

64. Fink v. Board of Educ., 498 N.Y.S.2d 440 (App. Div. 1986).
65. Rowe v. Board of Educ., 502 N.Y.S.2d 294 (App. Div. 1986).
66. *Id.* at 295.
67. Melder v. State Farm Fire & Casualty Co., 498 So. 2d 1095 (La. Ct. App. 1986).
68. *Id.* at 1096.

responsible for an act of a child for which the child would have been responsible except for his age. As the court found no violation of law by the child, his parents could not be held in strict liability.

As compared with recent years, there was an increase in the number of worker's compensation cases in 1986. While there were several cases decided on jurisdictional or other technical issues,[69] those which were fully examined were more often than not decided for the worker.

A school cafeteria worker in Texas, who was injured when she tripped over a dough mixer filed for worker's compensation disability benefits. The district court's decision, later affirmed by the court of appeals, disregarded the jury's findings regarding the worker's claim of total loss of the use of her lower left leg. The Supreme Court of Texas reversed that decision holding that the fact that the worker returned to work during part of the period of disability, was not conclusive on the issue of total loss. The court reminded that:

> In reviewing a worker's compensation case, this court has always recognized that because the injured employee, coming under the terms of the Workers' Compensation Act, is denied his common law rights, the Act should be liberally construed in the worker's favor. If there be any reasonable doubt which may arise in a particular case as to the right of the injured employee to compensation, it should be resolved in favor of such right.[70]

A Pennsylvania teacher who lost four front teeth after being attacked by students, brought an action for worker's compensation.[71] In the appeal from the award for benefits, the commonwealth court held that the award was proper. The key issue was whether pictures of the teacher without teeth were an actual representation of her appearance, as she

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69. Malone v. Industrial Comm'n of Ill., 499 N.E.2d 1167 (Ill. App. Ct. 1986) (claimant's failure to file a receipt showing payment of probable costs of record deprived a circuit court of jurisdiction); Collins v. Waterford School Dist., 385 N.W.2d 712 (Mich. Ct. App. 1986) (worker's compensation board gives jurisdiction over circuit court during pendency of an appeal to the board); Guillory v. State, 486 So. 2d 1195 (La. Ct. App. 1986) (statement that clear and convincing evidence was the standard of proof to be applied was held to be a harmless error); Duos v. Evangeline Parish School Bd., 499 So. 2d 1007 (La. Ct. App. 1986) (teacher's suit barred for untimely notice); Bickham v. Orleans Parish School Bd., 488 So. 2d 1248 (La. Ct. App. 1986) (negligence action found inappropriate remedy for injuries from sexual assault); Ringgold School Dist. v. W.C.A.B., 507 A.2d 870 (Pa. Commw. Ct. 1986) (claimant's disability benefits determined to be property based upon weekly wage on date of original injury rather than his wages at the time of recurrence of disability).

70. Navarette v. Temple Indep. School Dist., 706 S.W.2d 308, 309 (Tex. 1986). *See also* Port Neches Indep. School Dist. v. Soignier, 702 S.W.2d 756 (Tex. Ct. App. 1986) (plaintiff was never told to stay off a basketball goal while painting a school gymnasium when it was obvious that the scaffold would not reach the area where the accident occurred).

71. School Dist. of Philadelphia v. W.C.A.B., 511 A.2d 947 (Pa. Commw. Ct. 1986).

did have a fixed bridge prothesis. The court held that the worker's compensation referee had properly exercised his discretion in assessing the degree of her disfigurement.

In Texas, a school district employee who injured his back while working brought suit against the district for workman's compensation.[72] The district claimed that the employee had not followed medical advice that he lose weight and exercise to maximize his opportunity for recovery. The court of appeals affirmed a lower court decision that the employee was entitled to compensation as his failure to lose weight and exercise were not willful practices.

The long-term effects of an injury were examined in a Michigan case.[73] The Workman's Compensation Appeal Board awarded a school bus driver disability benefits for an injury he sustained while working. Eighteen months after the original injury, the driver further injured his back while moving from his residence. He admitted to lifting some light objects. Following a hearing, his claim for benefits was denied because he had aggravated his back injury by moving personal goods. A divided panel of the appeal board reversed the hearing officer's ruling because the driver's work related injury was found to contribute to his disability. In affirming that decision, the Michigan Court of Appeals found that the driver had no reason to know the hazard he was exposing himself to by picking up light objects.

A case which was decided against the worker was brought as a fatal claim petition by the widow of a Pennsylvania superintendent of schools.[74] She alleged that job related stress was a precipitating factor in triggering her husband's fatal heart attack. The school district appealed an order of the Workman's Compensation Appeal Board awarding benefits to the widow. The commonwealth court reversed that decision determining that the original finding that the heart attack was job related was unsupported by testimony.

Whether a state can allow school districts to operate without workman's compensation was the issue in a case from Mississippi.[75] That state had a legislative exemption of state employees from mandatory work-

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72. Austin Indep. School Dist. v. Maynard, 711 S.W.2d 377 (Tex. Ct. App. 1986).

73. Schaefer v. Williamston Community Schools, 387 N.W.2d 856 (Mich. Ct. App. 1986). *But see* Mitchell v. Orleans Parish School Bd., 483 So. 2d 1272 (La. Ct. App. 1986) (a claim was denied as the worker's later injury to her knee was found unrelated to her earlier injury to her neck and back).

74. Rockwood Area School Dist. v. W.C.A.B., 511 A.2d 263 (Pa. Commw. Ct. 1986).

75. Adams v. Petal Mun. Separate School Systems, 487 So. 2d 1329 (Miss. 1986). *See also* Board of Educ. v. Renehan, 504 A.2d 635 (Md. 1986) (workman's compensation was reduced to the point where the amount already paid exceeded the total sum due and the employer and insurer were not required to continue making payments to satisfy the claimant's debt to her attorney).

man's compensation coverage. In upholding the dismissal of a claim against a school district, the Supreme Court of Mississippi recognized that all school systems in the state did not have the financial resources to purchase such coverage. This, the court determined, provided a rational basis for making such coverage discretionary.

In a final case involving the injury of a school employee, a New York city teacher brought an action against the city to recover for damages incurred when she was injured trying to stop a fight in the school cafeteria.[76] Prior to his action, the teacher requested that a security guard accompany him to the scene of the confrontation. When the teacher intervened, he was assaulted by one of the students while the security guard stood by and took no action. In reversing the trial court and deeming the case appropriate for trial, the appellate court found that a reasonable person would construe the guard's actions as an implicit promise of aid. The guard's conduct was seen as creating a special relationship which established a duty to protect the teacher. It was left for trial to determine whether that duty had been breached.

Assault and Battery

An Illinois high school student faced a charge of battery in an incident on a school bus.[77] The driver had instructed the student to put out his cigarette. Although the student complied, he called the driver names and threatened her. Following other incidents on the way home, the driver returned the students to school. The next day, after discharging the last of her students, the driver's bus was hit by a barrage of rocks causing her great physical harm. Despite the contradictory nature of the testimony of the students present during the stoning incident, it was established that the defendant was one of the group throwing rocks. He was charged and convicted of two counts of aggravated battery. The Appellate Court of Illinois did not accept the argument that the defendant only knowingly threw rocks, and did not knowingly cause great bodily harm.

As a result of being assaulted by an intruder in her office, a New York board of education employee brought action against the board.[78] The supreme court, appellate division affirmed a lower court determination that the board could not be held liable absent a showing that it owed a special duty to the employee. Additionally, the employee failed to show any evidence of prior criminal acts in the building, or an absence on the part of the board to take reasonable steps to minimize the foreseeable danger.

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76. Bloom v. City of New York, 507 N.Y.S.2d 13 (App. Div. 1986).
77. People v. Lesley, 498 N.E.2d 270 (Ill. App. Ct. 1986).
78. Ferrara v. Board of Educ., 498 N.Y.S.2d 10 (App. Div. 1986).

Michigan students and parents brought an action against the school district and related parties for battery, false imprisonment, negligent hiring, use of unreasonable force on a student, and violation of civil rights.[79] The suit was brought due to the actions of a teacher who used physical force to bring a student to the office. The Michigan Court of Appeals affirmed the trial court's decision which dismissed the civil rights count, and found (1) the state's corporal punishment statute did not deny equal protection of the law, (2) the school district was immune from counts of negligent hiring and supervision, (3) the principal was immune on the count of false imprisonment, and (4) the cause of action against the teacher for his false imprisonment was not substantiated.

The interpretation of the Idaho Torts Claim Act (ITCA) was the basis for a decision in a case concerning four elementary school students who had been sexually molested by their fourth grade teacher.[80] The plaintiffs, through their parents, sought damages naming the teacher and school district as defendants. The teacher admitted some of the complaints, and then cross-claimed against the school district for indemnification under the ITCA. The school district answered by denying any liability and cross-claimed against the teacher for indemnification. The district answered the plaintiff's complaints by denying liability and counter claiming for attorney's fees.

The district court held that the plaintiffs were precluded from recovery under the assault and battery exception to the ITCA. In addition, the court held that the teacher could not seek indemnification because he was not acting within the course and scope of his employment when he committed the sexual acts. Both the plaintiff and the teacher appealed.

On the issue of the teacher's cross-claim for indemnification, the criminal intent of his actions was recognized by the Supreme Court of Idaho. This absolved the district from indemnifying him as a matter of law. However, the court reversed the decision involving the plaintiff's claim against the school district. A distinction was drawn between the conduct which forms the basis of a cause of action in negligence and one for assault and battery. The ITCA made every state governmental entity liable for damages arising out of its negligent acts or omissions. The court found the injuries to the children the foreseeable consequences of the district's negligence in retaining the teacher despite full knowledge of his proclivities.

A charge of battery was brought in small claims court against a New York school bus matron who slapped a child. Although the slap was not

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79. Wilbaughby v. Lehrbass, 388 N.W.2d 688 (Mich. Ct. App. 1986).
80. Doe v. Durtschi, 716 P.2d 1238 (Idaho 1986).

found to be an excessive use of force, the matron was found liable. A New York City civil court reached the same conclusion explaining that "any person who physically assaults a child for any reason other than self-defense or the defense of others is liable to that child for monetary damages."[81]

DEFAMATION

After obtaining a permanent appointment as a school district's superintendent of buildings and grounds, an administrator sued a newspaper for defamation.[82] In affirming and modifying a lower court decision, a New York appellate court made the following determinations: (1) the series of articles published expressed or implied political influence and manipulation in the plaintiff's quest for appointment, but absent a clear assertion of criminality, these were not defamatory; (2) two published editorials were not libelous as editorial opinion may not be the subject of a defamation action, provided that the facts supporting the opinion are set forth; (3) the publication of an anonymous letter to the editor was seen as requiring a determination of fact at trial as to whether it was printed with malice.

A formerly employed high school teacher brought a slander action against a school superintendent based on statements the superintendent made in response to an inquiry from a potential employer.[83] The superior court entered judgment on a jury verdict for the teacher. In upholding that decision, the Supreme Judicial Court of Maine examined three contentions made by the defendant. First, the superintendent was performing a discretionary function or duty. The court disagreed, pointing out that the teacher had not worked in the district for two years and was seeking employment elsewhere. Second, the superintendent's statements were expression of opinion protected by the first amendment. The court disagreed explaining that an essential element of slander is that the statements in question contain false statements of fact. The statements implying that the plaintiff was not a good teacher, failed to give assistance outside the classroom, and was not involved in extracurricular activities, were not found factually based. Third, the defendant is a public official and therefore must prove actual malice. Again the court disagreed, finding that the authority exercised by a teacher is very

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81. Rodriguez v. Johnson, 504 N.Y.S.2d 379, 382 (Civ. Ct. 1986).

82. DiBernardo v. Tonawanda Publishing Co., 499 N.Y.S.2d 553 (App. Div. 1986). *See also* Mahoney v. Adirondack Publishing Co., 509 N.Y.S.2d 193 (App. Div. 1986) (high school football coach was successful in a libel action against a newspaper); O'Neil v. Peekskill Faculty Ass'n, 507 N.Y.S.2d 173 (App. Div. 1986).

83. True v. Ladner, 513 A.2d 257 (Me. 1986).

limited. Teachers do not have access to channels of effective communication enjoyed by public officials and public figures. Therefore, the trial court did not err in ruling the teacher was not a public official.

A defamation action was filed by an Alabama high school student against the school board.[84] The boy's father had addressed the board seeking the removal of a suspension for marijuana possession from his son's record. In an appeal of a circuit court decision, the Supreme Court of Alabama held that statements made by a school board member, and later broadcast by a local radio station, were a fair response to charges made against the board. The court added that the record showed the board had suggested the matter could be better considered in executive session, but the father had wanted a public airing of the complaint.

A former substitute teacher brought suit alleging that the school board had refused to hire her for a vacancy and dropped her from the list of approved substitute teachers in violation of her constitutional rights.[85] The district court found that although her speech at a school board meeting was protected under the first amendment, she did not have the property interest necessary to state a claim. The teacher's claim that a statement by the school board president was defamatory was not upheld as the court explained that statements of pure opinion which are not defamatory could not be a basis for a slander suit. For a statement of opinion to be defamatory in nature, the plaintiff would have to demonstrate that the opinion implied the existence of undisclosed defamatory facts.

A Minnesota teacher brought a defamation action against the school board, superintendent, and principal. In addition, he claimed there had been a violation of an open meeting law and civil rights law.[86] The court of appeals, in affirming the district court, found that the publication of school board proceedings at which allegations against the plaintiff were discussed was mandatory by statute. Therefore, the school board and school officials had absolute privilege with regards to the defamation claim. Since the teacher was not found entitled to a private hearing, the action for deprivation of civil rights could not be maintained.

PRODUCTS LIABILITY

A South Carolina school district brought a suit against two asbestos companies to recover the costs of removing and replacing ceilings containing asbestos.[87] After the district court found in favor of the

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84. Morrison v. Mobile County Bd. of Educ., 495 So. 2d 1086 (Ala. 1986).
85. Lees v. West Greene School Dist., 632 F. Supp. 1327 (W.D. Pa. 1986).
86. Grossman v. School Bd., 389 N.W.2d 532 (Minn. Ct. App. 1986).
87. Spartanburg County School Dist. v. National Gypsum Co., 805 F.2d 1148 (4th Cir. 1986).

companies, the school district appealed. The court of appeals set that decision aside finding that a manufacturer who sells a defectively designed dangerous product cannot escape liability by showing it could not have known of the defect. By instructing the jury otherwise, the trial court was found to have erroneously explained the concept of an implied warranty. Therefore, a new trial was deemed necessary.

In a second case involving asbestos, a Colorado school district brought an action against a company which designed, manufactured, distributed, and applied the asbestos products that were incorporated into the construction of the plaintiff's schools.[88] It was alleged that the defendants conspired to ignore, suppress, and not act upon the medical and scientific data in their possession indicating the hazards to the public from asbestos. Based on the theory of strict liability, the district sought damages relating to the cost of removing and replacing the asbestos and the items allegedly contaminated. Recognizing the act of civil conspiracy, the district court upheld all the plaintiff's claims, and explained that the United States Congress, in enacting the Asbestos School Hazard Detection and Control Act of 1980, recognized the dangers caused by exposure to asbestos fibers.

The Supreme Court of Alabama affirmed a circuit court decision that a school bus dealer and bus manufacturer did not breach the state's extended manufacturer's liability doctrine by manufacturing and selling school buses without seatbelts for student passengers.[89]

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A California high school teacher brought an action against his school district alleging an intentional infliction of emotional distress, as well as fraud and deceit.[90] In reversing the superior court and finding for the teacher, the court of appeals examined the district's breach of a settlement with the teacher concerning his teaching assignment. In recognizing the emotional distress caused this plaintiff, the court explained that employers should not be allowed to use the public policy behind work-

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88. Adams-Arapahoe School Dist. v. Celotex Corp., 637 F. Supp. 1207 (D. Colo. 1986).

89. Denton v. Eddins & Lee Bus Sales, Inc., 491 So. 2d 942 (Ala. 1986). *See* McClendon v. Norwood, 346 S.E.2d 1 (Ga. Ct. App. 1986) (unverified allegations that playground equipment injured a student were not held sufficient to create a jury issue when opposed by factual affidavits); Jemaa v. MacGregor Athletic Products, 390 N.W.2d 180 (Mich. Ct. App. 1986) (former high school football player who was injured had products liability claim denied on jurisdictional grounds).

90. Hodges v. Sweetwater Union High School Dist., 228 Cal. Rptr. 464 (Cal. Ct. App. 1986).

er's compensation as a shield against tort liability. As emotional distress is not contemplated under worker's compensation laws, the court held that it is not precluded by the exclusive remedy provisions of those statutes.

An action for intentional infliction of emotional distress and invasion of privacy was brought against a computer service by a teacher.[91] She alleged that the service had inadvertently placed scores from a state ordered Certified Personnel Testing Program in wrong envelopes. This resulted in her score being sent to another teacher. The plaintiff claimed this caused her to suffer mental anguish and extreme emotional distress.

The district court explained that to meet the test for emotional distress, "the conduct by the wrongdoer must be willfully and wantonly engaged in and be so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society."[92] In denying the claim the court held that, at most, a simple mistake was made. That alone was seen as insufficient to support a claim. On the issue of privacy, the court again failed to find a cause of action. There was no contention that the computer service, or anyone other than the plaintiff, communicated the scores to anyone other than the person who inadvertently received them. Thus, the communication of the scores to a single person was not held to be a violation of the plaintiff's privacy.

In an unusual action, the mother of an eight year old California girl who had been sexually assaulted and raped, brought an action against the school district for negligent and intentional infliction of emotional distress.[93] Over a period of four months the child was assaulted en route to school and on school premises by a thirteen year old male student. During this time, although the girl's teacher, principal, and the school psychologist knew of the assaults, the girl's mother was not informed. The mother theorized that had she been informed of the earlier assaults, she could have taken precautionary measures to prevent the rape. As a result of the school's failure to notify her of the assaults, the mother claimed to have suffered severe emotional distress. After her cause for action was denied by the superior court, the mother sought a writ of mandate for reinstatement. The court of appeals issued the writ, seeing the injuries for emotional distress to be reasonably foreseeable. In holding that a special relationship existed between the school and the mother, the court found that the school had a duty to notify the mother.

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91. Wood v. National Computer Systems, 643 F. Supp. 1093 (W.D. Ark. 1986).

92. *Id.* at 1097. *See also* Spence v. Board of Educ. of Christine School Dist., 806 F.2d 1198 (3d Cir. 1986) (damages for emotional distress were not found to be presumed from an infringement of a teacher's first amendment rights).

93. Phyllis P. v. Superior Court, 228 Cal. Rptr. 776 (Ct. App. 1986).

CONSTITUTIONAL TORTS

A San Diego committee against registration and the draft (CARD) alleged that a school board's actions and policies served to deprive the organization of its rights under the first and fourteenth amendments.[94] In particular, the organization's advertisements had been excluded from high school newspapers. The court of appeals reversed the district court's decision that the school board failed to show a compelling governmental interest for excluding the advertisements. By accepting military recruitment advertisements, the court held that a limited public forum had been created. The board failed to show any reasonable grounds for excluding CARD from its newspapers.

Student Initiated Cases

A Vermont school board was the defendant in an action brought by high school students who claimed an abridgment of their first amendment rights.[95] At issue was the board's refusal of permission for the production of a play concerning child runaways. The board's position was that the themes of drug abuse, alcoholism, prostitution, child abuse, and rape would compel the seeking of parental consent to view the production for many children. Furthermore, the board felt that such a production would be an improper allocation of educational resources and would not suitably fulfill the aims of public education.

The plaintiffs' section 1983 action asserted the defendant's liability for a direct abridgment of first amendment rights of free speech and communications, and for deprivation of a liberty interest in free speech without due process of law. The district court determined that there had been no direct abridgement since the students' right to free expression had to give way to the board's responsibility for the well being of the larger student body. Additionally, since there had been no auditions at the point the board disapproved the play, the student plaintiffs had no legitimate expectation that they would participate. Because there was no entitlement to participate in the play, the students had no entitlement to exercise their first amendment rights through such participation. Thus, the court concluded, the students had no liberty interest sufficient to evoke constitutional due process protection.

A Missouri student and her parents brought a civil rights action citing discrimination on the part of the school district.[96] It was alleged

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94. San Diego Comm. v. Governing Bd., 790 F.2d 1471 (9th Cir. 1986).

95. Bell v. U-32 Bd. of Educ., 630 F. Supp. 939 (D. Vt. 1986).

96. Bond v. Keck, 629 F. Supp. 225 (E.D. Mo. 1986). *See also* Raposa v. Meade School Dist., 790 F.2d 1349 (8th Cir. 1986) (teacher's first amendment rights not violated and teacher lacked property and liberty interest under fourteenth amendment).

that the discrimination was with respect to the student's placement in an instructional math class. Following a finding in favor of the defendants, they moved for an award for attorneys' fees. In upholding the district's claim, the appellate court explained its intention to help deter the filing of frivolous or groundless civil rights suits.

Employee Initiated Cases

A high school teacher in Florida brought an action claiming that, because of his exercise of his first amendment rights, school officials had retaliated against him through teaching assignments.[97] The teacher had met with his principal, that principal's replacement, and the superintendent of schools regarding registration procedures, the assignment of uncertified teachers to classes, and changes in his own assignment. After a second year of assignments he felt were inappropriate, the teacher filed this action.

In affirming the lower court decision against the teacher, the court of appeals outlined the analytic framework which gave definition to the plaintiff's first amendment claim. For that claim to prevail, the plaintiff had to establish that his speech was both constitutionally protected, and a substantial or motivating factor in the decision to alter his teaching assignments. If successful in making this showing, the burden would then shift to the school administrators to show they would have altered his teaching assignments even in the absence of his protected speech.

The court cited the decision in Connick v. *Meyers*[98] as the most recent Supreme Court examination of the issue. In that case, it was determined that the question of whether a public employee's speech is constitutionally protected turns upon whether the speech relates to a matter of public concern, or to one of mere personal interest to the employee.

The burden of proof in the instant case was found to fall upon the teacher rather than upon the administrators. The teacher admitted that he spoke out against the method of registration because it contributed to his inability to maintain control of students. His speech concerning teaching assignments likewise was seen as an employee's grievance concerning internal school policy. After considering the form, content, and context of the teacher's speech, the court concluded that it could not fairly be characterized as constituting speech on a matter of public concern.

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97. Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986).

98. 461 U.S. 138 (1983). *But see* Cox v. Dardanelle Pub. School Dist., 790 F.2d 668 (8th Cir. 1986) (court upheld teacher's contention of wrongful discharge for exercising her first amendment rights).

In Virginia, an unmarried pregnant teacher, who was forced to take a leave of absence, brought suit alleging a violation of her constitutional right to privacy and her statutory rights under title VII.[99] The district court agreed with her privacy claim, explaining that her rights to privacy included the right to bear a child out of wedlock.[100] The school board was unable to assert a state interest outweighing that of the teacher. Similary, the violation of the teacher's title VII rights were recognized.

A tenured teacher in Michigan was suspended following a parent's complaint about his teaching methods in a seventh grade science course. It was alleged that he showed sexually explicit pictures and films. Before being reinstated, the teacher brought an action against the board of education, school administrators, and parents alleging a deprivation of liberty and property without due process of law, and a violation of his first amendment right to academic freedom.[101]

The district court instructed the jury on the elements of compensatory and punitive damages, and also charged the jury that additional compensatory damages could be awarded based on the value or importance of the constitutional rights that were violated. The jury found the school district liable and awarded both punitive and compensatory damages. That decision was affirmed by the court of appeals.

The issue examined by the Supreme Court was whether an award of compensatory damages could be based on an assessment of the value of a substantive constitutional right. The Court reversed the lower court decision and remanded the case for a new trial limited to the issue of compensatory damages. The Court held that the abstract value of a constitutional right cannot be the basis for section 1983 damages.

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99. Ponton v. Newport News School Bd., 632 F. Supp. 1056 (E.D. Va. 1986). *See also* Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986) (subjecting school bus attendant to urinalysis without probable cause or any individualized suspicion was found to be a violation of her fourth amendment rights).

100. Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977).

101. Memphis Community School Dist. v. Stachura, 106 S. Ct. 2537 (1986).